IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

	)	
In re The Videohouse, Inc., *et al.*,	)	No. 16-1051
	)	
Petitioners.	)	

RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

In an emergency petition for a writ of mandamus filed on February 11, 2016, petitioners ask the Court to order the FCC to rule by February 19, 2016 on a pending reconsideration petition in the Commission's broadcast incentive auction proceeding. The Commission today released an order denying the reconsideration petition. A copy of the order is attached. With the release of the order, the mandamus petition has become moot and should be dismissed.

Respectfully submitted,

Jonathan B. Sallet
General Counsel

Jacob M. Lewis
Associate General Counsel

/s/James M. Carr

James M. Carr
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

February 12, 2016

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	)	GN Docket No. 12-268
	)	
	)	
	)	

ORDER ON RECONSIDERATION

Adopted: February 8, 2016 **Released: February 12, 2016**

By the Commission: Commissioner Pai dissenting and issuing a statement; Commissioner O'Rielly concurring in part, dissenting in part and issuing a separate statement.

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I. INTRODUCTION

1. Petitioners The Videohouse, Inc., Abacus Television, WMTM, LLC, and KMYA, LLC[1] seek reconsideration of the Commission's decision, on procedural and substantive grounds, not to protect their broadcast television stations in the repacking process or make them eligible for the reverse auction.[2] We dismiss and, on alternative and independent grounds, deny the Petition. For the reasons below, we also conclude that WDYB-CD, Daytona Beach, Florida, licensed to Latina Broadcasters of Daytona Beach, LLC (Latina), is not entitled to discretionary repacking protection or eligible to participate in the reverse auction.

[1] The Videohouse, Inc. (Videohouse), Abacus Television (Abacus), WMTM, LLC (WMTM), KMYA, LLC (KMYA) Petition for Reconsideration, GN Docket No. 12-268 (filed Sept. 2, 2015) (Petition). At the time the Petition was filed, Videohouse, Abacus, WMTM, and KMYA were the licensees of the following stations, respectively: WOSC-CD, Pittsburgh, Pennsylvania; WPTG-CD, Pittsburgh; WIAV-CD, Washington, D.C.; and KKYK-CD, Little Rock, Arkansas. WPTG-CD and KKYK-CD have since been acquired by Fifth Street Enterprise, LLC and Kaleidoscope Foundation, Inc., respectively.

[2] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Second Order on Reconsideration, 30 FCC Rcd 6746, 6767-75, paras. 50-63 (2015) (*Reconsideration Order*). *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6670-72, paras. 232-35 (2014), *aff'd, Nat'l Assoc. of Broadcasters, et al. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015) (*Incentive Auction R&O*).

II. BACKGROUND

2. In the *Incentive Auction R&O*, the Commission concluded that the Spectrum Act[3] mandates that the Commission make all reasonable efforts to preserve, in the repacking process associated with the broadcast television spectrum incentive auction, the coverage area and population served of only full power and Class A broadcast television facilities (1) licensed as of February 22, 2012, the date of enactment of the Spectrum Act, or (2) for which an application for a license to cover was on file as of February 22, 2012.[4] The Commission did not interpret the Spectrum Act, however, as precluding it from exercising discretion to protect additional facilities beyond the statutory floor.[5] The Commission granted discretionary protection to a handful of categories of facilities, based on a careful balancing of different factors in order to achieve the goals of the Spectrum Act and other statutory and Commission goals.[6]

3. One category to which the Commission declined to extend discretionary protection was "out-of-core" Class A-eligible LPTV stations": low power television (LPTV) stations that operated on "out-of-core" channels (channels 52-69) when the Community Broadcasters Protection Act (CBPA)[7] was enacted in 1999 and obtained an authorization for an "in-core" channel (channels 2-51), but did not file for a Class A license to cover by February 22, 2012.[8] The Commission explained that protecting these stations, which numbered approximately 100, would encumber additional broadcast television spectrum, thereby increasing the number of constraints on the repacking process and limiting the Commission's flexibility to repurpose spectrum for flexible use.[9] The Commission recognized that these stations had made investments in their facilities, but concluded that this equitable interest did not outweigh the "significant detrimental impact on repacking flexibility that would result from protecting them," especially in light of their failure to take the necessary steps to obtain a Class A license and eliminate their secondary status during the ten-plus years between passage of the CBPA and the Spectrum Act.[10] The Commission did decide to protect one station in this category, KHTV-CD, based on licensee Venture Technologies Group, LLC's (Venture) showing in response to the *Incentive Auction NPRM*[11] that discretionary protection of KHTV-CD was warranted.[12]

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[3] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012) (Spectrum Act).

[4] *Incentive Auction R&O*, 29 FCC Rcd at 6652-54, paras. 185-89. *See id.* at 6652-53, para. 186 ("The statutory mandate to make all reasonable efforts to 'preserve' coverage area and population 'served' as of a date certain (February 22, 2012) clearly reflects a Congressional intent to protect or maintain facilities operating on this date. . . . The full power and Class A facilities that were in operation as of February 22, 2012 are facilities that were licensed on that date or for which an application for a license to cover an authorized construction permit was on file.").

[5] *See Incentive Auction R&O*, 29 FCC Rcd at 6654-55, para. 191.

[6] *See id.* at 6655-77, paras. 192-245.

[7] Pub. L. No. 106-113, 113 Stat. Appendix 1 at pp. 1501A-594 – 1501A-598 (1999), *codified at* 47 U.S.C. § 336(f).

[8] *Incentive Auction R&O*, 29 FCC Rcd at 6670-72, paras. 232-35. The CBPA accorded "primary" or protected Class A status to certain qualifying LPTV stations. *See id.* at 6673-74, para. 239 ("secondary" LPTV stations "may not cause interference to, and must accept interference from, full service television stations, certain land mobile radio operations and other primary services.") (internal quotes and cited omitted). Although the statute prohibited granting Class A status to LPTV stations on out-of-core channels, it provided such stations with an opportunity to achieve Class A status on an in-core channel. *See id.* at 6670, para. 232.

[9] *Incentive Auction R&O*, 29 FCC Rcd at 6671, para. 234. *See id.* at n.725 (noting that "almost all" of the stations in the category "operate on UHF channels" and that many "are located in spectrum-congested areas," increasing their potential impact on the Commission's flexibility to repurpose spectrum).

[10] *See id*. at para. 234.

[11] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Notice of Proposed Rulemaking, 27 FCC Rcd 12357 (2012) ("*Incentive Auction NPRM*").

[12] *Incentive Auction R&O*, 29 FCC Rcd at 6671-72, para. 235 (explaining that KHTV-CD demonstrated that it made repeated efforts over the course of a decade after the enactment of the CBPA to find an in-core channel, had a Class

4. Abacus and Videohouse, licensees of two stations in the out-of-core Class A-eligible LPTV station category, filed petitions for reconsideration of the *Incentive Auction R&O* asking the Commission to protect their stations in the repacking process and make them eligible for the reverse auction.[13] The Commission rejected their claims that they are entitled to repacking protection under the CBPA.[14] The Commission dismissed on procedural grounds their claims that they should be protected because they are similarly situated to KHTV-CD, but also considered and rejected the claims on the merits.[15] In addition, the Commission rejected arguments disputing its estimate that the category of out-of-core Class A-eligible stations included approximately 100 stations.[16]

5. In the *Reconsideration Order*, the Commission also clarified that a Class A station that had an application for a license to cover a Class A facility on file or granted as of February 22, 2012 is entitled to mandatory protection, but that a Class A station that had an application for a Class A construction permit on file or granted as of that date would not be entitled to such protection.[17] Based on a careful balancing of relevant factors, it also decided to extend discretionary protection to stations in the latter category—stations that did not construct in-core Class A facilities until after February 22, 2012 but requested Class A construction permits prior to that date. The Commission reasoned that these stations are similarly situated to KHTV-CD because as of February 22, 2012, the date established by Congress for determining which stations are entitled to repacking protection, these stations had certified in an application filed with the Commission that they were acting like Class A stations.[18] The Commission concluded that there were significant equities in favor of protecting the approximately 12 stations in this category that outweighed the limited adverse impact that such protection would have on its flexibility to repurpose spectrum for flexible use through the incentive auction.[19] Conversely, the Commission explained, Abacus and Videohouse did not certify continuing compliance with Class A requirements until after the enactment of the Spectrum Act.[20]

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A construction permit application on file certifying that it was meeting the regulatory requirements applicable to Class A stations prior to enactment of the Spectrum Act, and filed an application for a license to cover a Class A facility on February 24, 2012, just two days after the Spectrum Act was enacted).

[13] *See* Abacus Petition for Reconsideration, GN Docket No. 12-268 (filed Sept. 15, 2014); Videohouse Petition for Reconsideration, GN Docket No. 12-268 (filed Sept. 15, 2014) (collectively, 2014 Petitions). Asiavision, Inc. (Asiavision), the previous licensee of WIAV-CD, submitted a responsive filing raising arguments similar to those raised by Abacus and Videohouse. *See* Asiavision Opposition, GN Docket No. 12-268 (filed Nov. 9, 2014). The Commission dismissed this filing as a late-filed petition for reconsideration but nonetheless treated it as an informal comment. *See Reconsideration Order*, 30 FCC Rcd at 6769 n.183.

[14] *See Reconsideration Order*, 30 FCC Rcd at 6770-72, paras. 55-58.

[15] *See id.* at 6772-74, paras. 59-60.

[16] *See id*. at 6770, para. 54.

[17] *See id*. at 6769, para. 53. An application for a license to cover a Class A facility signifies that the Class A-eligible LPTV station has constructed its authorized Class A facility, and authorizes operation of the facility. *See id*. A Class A construction permit application seeks to convert an LPTV construction permit to a Class A permit. *See id*. Grant of a construction permit standing alone does not authorize operation of the authorized facility. *See id*.

[18] *Id*. at 6774-75, para. 62 ("By filing an application for a Class A construction permit prior to February 22, 2012, each of these stations documented efforts prior to passage of the Spectrum Act to remove their secondary status and avail themselves of Class A status. Under the Commission's rules, these stations were required to make the same certifications as if they had applied for a license to cover a Class A facility. Among other things, each was required to certify that it 'does, and will continue to, broadcast' a minimum of 18 hours per day and an average of at least three hours per week of local programming and that it complied with requirements applicable to full-power stations that apply to Class A stations.").

[19] *See id.* The Commission also recognized that, having first filed a Class A construction permit application prior to February 22, 2012, the licensees of these stations may not have realized that the stations were not entitled to mandatory protection under the Spectrum Act. *Id*.

6. Abacus, Videohouse, and the licensees of two other stations in the out-of-core Class A-eligible LPTV category that did not seek to obtain Class A status until after February 22, 2012, seek reconsideration of the *Reconsideration Order*.[21] They argue that the Commission erred procedurally by dismissing the 2014 Petitions, and exceeded its authority by extending protection to a different group of Class A stations that had not asked for reconsideration. On the merits, they contend that their stations are no different from the out-of-core Class A-eligible LPTV stations that the Commission decided to protect, and that extending protection to their stations would not adversely impact the Commission's repacking flexibility. They claim the equities weigh in favor of protecting stations that obtained a Class A license by the Pre-Auction Licensing Deadline (May 29, 2015) and met other auction-related filing requirements. For the reasons below, we affirm our action in the *Reconsideration Order*.

III. DISCUSSION

7. Petitioners' claims are both procedurally and substantively defective and we therefore dismiss their claims and, in the alternative, deny them on the merits.

A. Petitioners' Claims Are Procedurally Improper

8. First, as we explained in the *Reconsideration Order*,[22] the Commission squarely raised the question of which broadcast television facilities to protect in the repacking process in the *Incentive Auction NPRM*, but none of the Petitioners presented facts or arguments as to why its station should be protected until after the Commission adopted the *Incentive Auction R&O*, although all of the facts and arguments they now present existed beforehand.[23] While Videohouse notes that its owner on behalf of a related entity (Bruno Goodworth Network, Inc.) filed reply comments in response to the *Incentive Auction NPRM*, those comments did not pertain to out-of-core Class A-eligible LPTV stations generally or to its station in particular.[24] In contrast, Venture submitted comments in response to the *Incentive Auction NPRM* regarding the particular facts and circumstances that it maintained—and the Commission agreed—

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[20] *See Reconsideration Order*, 30 FCC Rcd at 6673-74, para. 60, 6774-75, para. 62.

[21] Petitioners also attached to the Petition a copy of each of their Petitions for Eligible Entity Status ("Eligibility Petition") filed July 9, 2015 in GN Docket No. 12-268 in response to the Media Bureau's June 9, 2015 Public Notice. *See Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, Public Notice, 30 FCC Rcd 6153 (MB 2015) (announcing each station facility eligible for protection in the repacking process, and that a licensee can file a Petition for Eligible Entity Status explaining the reason it believes an omitted facility is eligible consistent with the *Incentive Auction R&O*).

[22] *See Reconsideration Order*, 30 FCC Rcd at 6672-73, para. 59.

[23] *See* Videohouse Eligibility Petition at 4-9 (discussing facts from March 2009 until January 2013); Abacus Eligibility Petition at 2-7 (discussing facts from October 2009 until April 2014); WMTM Eligibility Petition at 2 (discussing facts beginning in 2009); KMYA Eligibility Petition at 2-8 (discussing facts between 2009 and 2012).

[24] *See* Videohouse Eligibility Petition at 3-4 (citing Bruno Goodworth Reply Comments, GN Docket No. 12-268, filed Mar. 11, 2013) (addressing the appropriate date for determining the spectrum usage rights eligible for relinquishment in the reverse auction of an entity holding a Class A license for an analog station before February 22, 2012, but converting to digital after February 22, 2012). Videohouse also claims that it discussed out-of-core Class A-eligible LPTV stations with Commission staff at an industry forum in April 2013, but Videohouse never made these statements part of the record of this proceeding until July 2015, over a year after adoption of the *Incentive Auction R&O*. *See* Videohouse Eligibility Petition at 4. Abacus refers to an email it sent Commission staff in March 2014, Abacus Eligibility Petition at 2 n.1, but Abacus never filed this email in the record, and the first reference to it in the record was not until July 2015. *See* 47 C.F.R. § 1.7 ("documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission"); *Incentive Auction NPRM*, 27 FCC Rcd at 12494-95, para. 417 ("written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system"). Petitioners also refer to other record submissions after adoption of the *Incentive Auction R&O*. *See* Videohouse Eligibility Petition at 3-4 (referring to a filing submitted by the Bruno Goodworth Network on November 24, 2014); Petition at 5 (referring to a May 2015 *ex parte*).

justified protection of KHTV-CD. Contrary to Petitioners' arguments,[25] therefore, the Commission did not err in dismissing the 2014 Petitions, and the current Petition likewise is subject to dismissal. In addition, the facts and arguments put forth in the Petition are repetitious with regard to Abacus, Videohouse, and WMTM, each of whom sought reconsideration of the *Incentive Auction R&O*: the Commission considered and rejected those facts and arguments in the *Reconsideration Order*.[26]

9. For reasons similar to those on which we relied in the *Reconsideration Order*, we also reject Petitioners' new argument that, notwithstanding their failure to advocate protection of their stations in a timely manner, their claims were procedurally proper because other parties generally advocated protection of Class A stations in response to the *Incentive Auction NPRM*.[27] Contrary to Petitioners' argument, no commenter generally advocated discretionary protection of out-of-core Class A-eligible stations.[28] As we previously explained, Venture put forth particular facts in response to the *Incentive Auction NPRM* demonstrating why KHTV-CD should be afforded discretionary protection. The decision to protect KHTV-CD was based in part on this evidence.[29] Petitioners now argue that, like KHTV-CD, each of their stations faced "unique" "hardships and obstacles."[30] But as we noted in the *Reconsideration Order*, Petitioners did not attempt to demonstrate in response to the *Incentive Auction NPRM* why they should be afforded discretionary protection.[31] Venture's presentation regarding KHTV-CD's unique circumstances does not bear at all on Petitioners' stations and did not constitute an "opportunity [for the Commission] to pass" on the facts and arguments that Petitioners now rely on.[32] Additionally, as

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[25] Petition at 3-5.

[26] *Reconsideration Order*, 30 FCC Rcd at 6773-75, paras. 60-62. *See* 47 C.F.R. § 1.429(i) ("a second petition for reconsideration may be dismissed by the staff as repetitious"). Asiavision, the previous licensee of WIAV-CD, now licensed to WMTM, filed informal comments in response to the 2014 Petitions. *See supr*a n.[13].

[27] *See* Petition at 3-5 (arguing that the appropriate inquiry is whether facts and arguments were previously presented to the Commission, not whether a particular individual presented those facts and arguments).

[28] With the exception of the Venture Reply Comments, which pertain specifically to KHTV-CD only, none of the comments in response to the *Incentive Auction NPRM* cited by Petitioners address out-of-core Class A-eligible LPTV stations at all. Petition at 4 n.10. *See* Action Community Television Broadcasting Network Comments at 2 and United Communications Corp. Comments at 5 (both advocating protection of stations that had a pending application for a license to cover a Class A facility as of February 22, 2012); Vision Communications Comments at 5-6 and Local Media Reply Comments at 2 (both supporting proposal to protect an entity holding a Class A license for an analog station before February 22, 2012, but converting to digital after February 22, 2012, based on the Class A licensee's digital companion facility even though the digital facility was not constructed prior to February 22, 2012); Casa En Denver Comments at 4, Entravision Comments at 2, KAZN Comments at 8, and Polnet Reply Comments at 2 (all urging the Commission to protect modifications to licensed full power and Class A facilities constructed after February 22, 2012); National Religious Broadcasters Comments at 7 (proposing that the Commission protect any LPTV station that could demonstrate that it has met the qualifications to apply for Class A status).

[29] *See Incentive Auction R&O*, 29 FCC Rcd at 6671-72, para. 235; *Reconsideration Order*, 30 FCC Rcd at 6673, para. 60.

[30] Petition at 7.

[31] *Reconsideration Order*, 30 FCC Rcd at 6672-73, para. 59

[32] We note that whether the Commission had an "opportunity to pass" on an issue is not the relevant statutory test. *See* Petition at 4 (relying on the fourth sentence of 47 U.S.C. § 405(a), which provides that a petition for reconsideration is a condition precedent to judicial review where the party seeking such review "relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."). Rather, Section 405(a) provides that "no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration." 47 U.S.C. § 405(a). *See also infra* n.[33] and accompanying text.

discussed below, Petitioners fail to meet the test for discretionary protection adopted in the *Reconsideration Order*.[33]

10. While the rules allow petitioners to raise facts or arguments on reconsideration that have not previously been presented under certain circumstances,[34] Petitioners have not demonstrated such circumstances, and their reliance on section 1.429(b)(1) is therefore misplaced.[35] Contrary to Petitioners' claims, the July 9, 2015 deadline for submission of the Pre-Auction Technical Certification Form is not a relevant event that has occurred since their last opportunity to present facts or arguments.[36] That date would be relevant only if we agreed with their challenges.[37] As we do not, the July 9, 2015 deadline is not a relevant circumstance for purposes of section 1.429(b)(1). We also reject Petitioners' argument that the public interest would be served by reconsideration.[38] The Commission has a "well-established policy of not considering matters that are first raised on reconsideration," premised on the statutory goals of "procedural regularity, administrative efficiency, and fundamental fairness."[39] Those goals would not be served by allowing Petitioners to sit back and hope for a decision in their favor, and only then, when the decision is adverse to them, to offer evidence of why they should be treated differently.[40]

B. Petitioners' Claims Fail on Substantive Grounds

11. As an alternative and independent ground for our decision, we consider and deny Petitioners' claims that discretionary protection of their stations is warranted. Petitioners argue that the Commission failed to distinguish their efforts to demonstrate compliance with the regulatory requirements applicable to Class A stations from those of the out-of-core Class A-eligible LPTV stations that it decided to protect.[41] On the contrary, we clearly explained in the *Reconsideration Order* that

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[33] *Reconsideration Order*, 30 FCC Rcd at 6674-75, para. 62.

[34] These circumstances are: (1) the facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; (2) the facts or arguments relied on were unknown to petitioner until after his last opportunity to present them, and he could not through the exercise of ordinary diligence have learned of them prior to such opportunity; or (3) the Commission determines that consideration of the facts or arguments relied on is required in the public interest. 47 C.F.R. § 1.429(b)(1)-(3). *See* 47 U.S.C. § 405(a).

[35] 47 C.F.R. § 1.429(b)(1).

[36] *See* Petition at 17-18.

[37] *See Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, Public Notice, DA 15-679 at pg. 4, n.21 and accompanying text (rel. June 9, 2015) (explaining that stations that were not protected under the *Incentive Auction R&O* would be added to the list of protected stations based on Pre-Auction Technical Certification Forms only in the event that pending reconsideration petitions regarding the stations were granted).

[38] *See* Petition at 17-18 (citing 47 C.F.R. § 1.429(b)(3)).

[39] *Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems,* WT Docket No. 04-344, Memorandum Opinion and Order, 26 FCC Rcd 8122, 8127, para. 13 (2011) (citations omitted); *see Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service,* WT Docket No. 98-169, Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 17 FCC Rcd 8520, 8527, para. 20 (2002) ("'The Communications Act, our rules, and the need for administrative orderliness require petitioners to raise issues in a timely manner.'") (quoting *Implementation of the AM Expanded Band Allotment Plan*, *Memorandum Opinion and Order*, 13 FCC Rcd 21872, 21784, para. 7 (1998))).

[40] *See Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) ("No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed."). We also reject Petitioners' claim that section 1.429(b)(2) is met here because they could not have known that the Commission would reject their Petition and extend protection to a different group of Class A stations. Petition at 18. As explained below, our decision in the *Reconsideration Order* to extend protection to certain stations but not to Petitioners' was a logical outgrowth of the proposals in the *Incentive Auction NPRM* and consistent with our statutory authority. *See infra* para. [18]. Accordingly, it does not furnish a basis for reconsideration under section 1.429(b)(2).

KHTV-CD and the other stations in the protected group filed applications for a Class A construction permit (FCC Form 302-CA) before February 22, 2012, and Petitioners did not.[42] The Form 302-CA requires the applicant to certify that it "does, and will continue to" meet all of the full power and Class A regulatory requirements that are applicable to Class A stations, subject to significant penalties for willful false statements.[43] Thus, as of February 22, 2012, the date established by Congress for determining which stations are entitled to repacking protection, these stations had on file with the Commission certifications that they were operating like Class A stations. Petitioners concede that they did not file a Form 302-CA application before February 22, 2012.[44] Their other pre-February 22, 2012 filings on which they rely do not demonstrate that their stations were operating like Class A stations.[45] Unlike the Form 302-CA, the documents Petitioners placed in their public inspection files before February 22, 2012 did not certify that their stations were in compliance with the full power requirements that apply to Class A stations.[46] Also

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[41] *See* Petition at 5-7.

[42] *See Reconsideration Order*, 30 FCC Rcd at 6673-74, para. 60, 6774-75, para. 62.

[43] *See id.* at 6774-75, para. 62. FCC Form 302-CA, page 6 ("Willful False Statements on this Form Are Punishable by Fine and/or Imprisonment (U.S. Code, Title 18, Section 1001), and/or Revocation of Any Station License or Construction Permit (U.S. Code, Title 47, Section 312(a)(1)), and/or Forfeiture (U.S. Code, Title 47, Section 503)"). *See also* 47 C.F.R. §§ 73.1015; 73.3513.

[44] Videohouse identifies no reasonable basis for its claim that it believed it could not file a Form 302-CA application in March 2009 because it was not certain the in-core channel it proposed in its LPTV construction permit application was feasible. *See* Videohouse Eligibility Petition at 5. *See also Letter from Thomas R. McCarthy, Counsel, The Videohouse Inc., et al. to Marlene H. Dortch, Secretary, FCC*, GN Docket No. 12-268, at pg. 2 (Jan. 25, 2016) (*1/25 Ex Parte Letter*). Videohouse could have filed a Form 302-CA application along with its LPTV construction permit application: if the staff had determined that the channel was not feasible, it could have dismissed both applications, and Videohouse could have filed new applications for a different channel. In any event, Videohouse does not address why it did not file a Form 302-CA application to convert its LPTV construction permit application into a Class A construction permit after the staff granted the LPTV permit application in September 2009. With respect to Abacus and WMTM, we previously addressed their claims that Commission staff advised them not to file a Form 302-CA until after their in-core facilities were licensed as LPTV stations. Abacus Eligibility Petition at 4, 7; WMTM Eligibility Petition at 2. *See Reconsideration Order*, 30 FCC Rcd at 6772 n.207. In addition, to the extent these entities relied on **informal staff advice, they did so** at their own risk. *See Deleted Station WPHR(FM), Ashtabula, Ohio,* Memorandum Opinion and Order, 11 FCC Rcd 8513, 8515 (1996). KMYA offers no explanation for failing to file a Form 302-CA application before February 22, 2012.

[45] *See* Petition at 6. *See also* Videohouse Eligibility Petition at 2-3; Abacus Eligibility Petition at 6-7; KMYA Eligibility Petition at 7. In their most recent filing, Petitioners for the first time claim that KKYK-CD obtained a Class A construction permit on February 16, 2012, prior to the statutory enactment date. *See 1/25 Ex Parte Letter* at pg. 3, n.4 and Att. A. This claim is unsupported by an examination of the Commission's records. In fact, the February 16, 2012 authorization was issued in response to a Form 346 application filed by KKYK-CD (then operating under the call sign KLRA-LP) for a modification to its LPTV construction permit. *See* https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101486763&formid=346&fac_num=57548. It was not until July 12, 2012 that KLRA-LP filed an FCC Form 302-CA to "convert authorized LPTV construction permit facilities to Class A facilities." *See* https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101502914&formid=4&fac_num=57548) (*see* item 5 – Purpose of Application). That application was granted on July 18, 2012, well after the statutory enactment date. It is this latter authorization, and not the February 16, 2012 authorization, that "affords CA [Class A] status." We have placed copies of the actual February 16 and July 18, 2012 authorizations mailed to the licensee in KKYK-CD's correspondence file in CDBS. *See* http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=63144. Petitioners' apparent attempt to recast the history of KKYK-CD, like their efforts to demonstrate that they were acting like Class A stations prior to February 22, 2012 based on post-dated public file submissions, *see infra*, nn.45-47 and accompanying text, illustrate the reasonableness of the Commission's bright-line test based on the filing of FCC Form 302-CA.

[46] *See* FCC Form 302-CA, Section II, Question 10 ("Operating Requirements. Licensee certifies that it complies with those station operating requirements set forth in subparts H and J of 47 C.F.R. Part 73 that are applicable to

unlike the Form 302-CA, the certifications contained in these documents as to compliance with regulatory requirements that apply to Class A stations only were voluntary and unenforceable, making them less reliable indicators as to whether the stations were providing the service required of a Class A station as of February 22, 2012.[47] In addition, Form 302-CA must be filed with the Commission, whereas there is no means to verify when Petitioners' certifications were placed in their public files.[48]

12. Contrary to Petitioners' arguments, it was reasonable for us to limit discretionary repacking protection and auction eligibility to out-of-core Class A-eligible LPTV stations that filed a Form 302-CA application before February 22, 2012, because that is the date established by Congress for determining which stations are entitled to repacking protection.[49] A station that filed a Form 302-CA application before February 22, 2012, demonstrated that it sought to avail itself of Class A status as of that date, and thus warranted protection and auction eligibility under the statutory scheme.[50] Conversely, Petitioners neither requested Class A status, nor demonstrated that they were providing Class A service, until after passage of the Spectrum Act created the potential for Class A status to yield substantial financial rewards through auction participation—over ten years after the CBPA made them eligible for such status.[51] On the date of enactment of the Spectrum Act, Petitioners operated LPTV stations.

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Class A stations."). *See also* 47 C.F.R. § 73.6026 (broadcast regulations applicable to Class A stations). Petitioners claim to have met one requirement applicable to full power stations: the airing of children's programming. *See* Petition at 6; Videohouse Eligibility Petition at 3; Abacus Eligibility Petition at 6. In the cases of Abacus and Videohouse, however, the required children's television reporting forms (FCC Form 398) were not filed until the second half of 2012, purporting to cover periods dating back to 2006. *See, e.g.*, WOSC, FCC Forms 398 for 1Q2006 through 3Q2012, Question 17 (filed Nov. 5, 2012), available at https://stations.fcc.gov/station-profile/wosc-cd/programs-list/ (conceding that the reports were filed "late" and that the station was "still in low power TV status" during this period); WPTG, FCC Forms 398 for 1Q2006 through 2Q2012, Question 17 (filed Sept. 24-25, 2012), available at https://stations.fcc.gov/station-profile/wptg-cd/programs-list/ (conceding that the reports were filed "late"). Moreover, Videohouse's FCC Forms 398 concede that WOSC-CD did not comply with certain children's television requirements because the station "has not filed its application for a Class A license." *See, e.g.,* WOSC 1Q2006 FCC Form 398, Question 17. *See also* 47 C.F.R. §§ 73.673, 73.6026. In the case of Petitioner WMTM, the FCC Forms 398 in WIAV's online public file commence in the first quarter of 2013, and say nothing as to whether it was complying with children's programming requirements as of February 22, 2012. *See, e.g.*, WIAV, FCC Forms 398, available at https://stations.fcc.gov/station-profile/wiav-cd/programs-list/.

[47] The certifications were voluntary because, at the time they were made, Petitioners were not Class A licensees and had not made the certifications required by the Form 302-CA. In addition, maintenance of a public inspection file was voluntary because LPTV stations are not subject to this requirement. Moreover, a document placed in a public inspection file is not subject to the same penalties as an application filed with the Commission. *See supra* n.[42].

[48] Petitioners did not file these certifications in the record. While the certifications are publicly available in the stations' online public file, they were not uploaded until 2014 or 2015. Moreover, in the case of WIAV, there are no certifications in its online public file before the first quarter of 2014, which says nothing as to whether it was pursuing Class A status as of February 22, 2012.

[49] 47 U.S.C. § 1452(b)(2). *See Incentive Auction R&O*, 29 FCC Rcd at 6652-53, para. 186 ("The statutory mandate to make all reasonable efforts to 'preserve' coverage area and population 'served' as of a date certain (February 22, 2012) clearly reflects a Congressional intent to protect or maintain facilities operating on this date."). The Commission has explained that reverse auction participation is limited to the licensees of full power and Class A television stations that will be protected in the repacking process. *See id.* at 6719, para. 357 ("Parity between repacking protections and reverse auction eligibility will further the goals of the incentive auction. . . . [I]t would be meaningless for us to recognize for relinquishment broader rights than those which we would protect in the repacking process. Unprotected usage rights will not affect our repacking flexibility or our ability to repurpose spectrum and thus will have no value in the reverse auction."). Thus, the date for determining auction eligibility is derived from the same February 22, 2012 date for establishing repacking protection.

[50] *See Reconsideration Order*, 30 FCC Rcd at 6774-75, para. 62. The Commission has explained that reverse auction participation is limited to the licensees of full power and Class A television stations that will be protected in the repacking process. *See Incentive Auction R&O*, 29 FCC Rcd at 6719, para. 357.

Congress did not include LPTV stations within the definition of broadcast television licensees entitled to repacking protection,[52] and protecting them as a matter of discretion would significantly constrain the Commission's repacking flexibility.[53] In addition, Petitioners' stations are particularly likely to impact repacking flexibility because they are located in congested markets such as Pittsburgh and Washington, D.C. where the constraints on the Commission's ability to repurpose spectrum through the auction will be greater than in less congested markets.[54]

13. While Petitioners are correct that there was no deadline for out-of-core Class A-eligible LPTV stations to file an application for a Class A construction permit (or an application for a license to cover a Class A facility),[55] a Class A-eligible LPTV station with a Form 302-CA application pending or granted as of February 22, 2012 demonstrated objective steps, prior to enactment of the Spectrum Act, to avail itself of Class A status, subject to all of the regulatory requirements that status entails.[56] Prior to February 22, 2012, these stations invested in broadcast television facilities based on the expectation that the facilities would receive protection as "primary" Class A stations. In contrast, Petitioners only sought Class A status after Congress designated such stations as eligible to participate in the auction – and after the date set by Congress to establish entitlement to repacking protection and auction eligibility.

14. We also reject Petitioners' argument that, regardless of whether they demonstrated that their stations were acting like Class A stations as of February 22, 2012, discretionary protection is warranted based on their overall efforts to achieve Class A status.[57] Soon after enactment of the CBPA in 1999, the Commission warned that "it would be in the best interest of qualified LPTV stations operating outside the core to try to locate an in-core channel now, as the core spectrum is becoming increasingly crowded and it is likely to become increasingly difficult to locate an in-core channel in the future."[58] Unlike KHTV-CD, which demonstrated that it commenced efforts to achieve Class A status soon after

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[51] *Reconsideration Order*, 30 FCC Rcd at 6774-75, para. 62.

[52] 47 U.S.C. § 1401(6) (defining "broadcast television licensee" as the "licensee of—(A) a full-power television station; or (B) a low-power television station that has been accorded primary status as a Class A television licensee" under section 73.6001(a) of the Commission's Rules),

[53] *Incentive Auction R&O*, 29 FCC Rcd at 6672-75, paras. 237-41. *See also Reconsideration Order*, 30 FCC Rcd at 6777-79, paras. 66-69.

[54] Accordingly, we reject the comments of the LPTV Coalition and WatchTV alleging that the Petitioners' four stations would have little or no impact on repacking flexibility. *See* LPTV Coalition Reply at 3; WatchTV Comments at 2-3. While some of the protected Class A stations also are located in congested markets, the impact on repacking flexibility is just one of the factors we must consider. *See Incentive Auction R&O*, 29 FCC Rcd at 6655-77, paras. 192-245 (exercise of discretion to protect facilities beyond the statutory floor requires a careful balancing of factors to carry out Spectrum Act and other goals).

[55] *See* Petition at 7.

[56] *See Reconsideration Order*, 30 FCC Rcd at 6774-75, para. 62.

[57] We also reject KMYA's claim that it is entitled to protection under the terms of the *Incentive Auction R&O* and CBPA. *See* KMYA Eligibility Petition at 4, 8. While KMYA held a digital LPTV construction permit as of February 22, 2012, it did not file a Form 302-CA application until after that date. While the Commission stated that a Class A licensee of an analog station as of February 22, 2012 would receive protection of its Class A digital facility if it was licensed by the Pre-Auction Licensing Deadline, KMYA was not a Class A licensee as of February 22, 2012. *See Incentive Auction R&O*, 29 FCC Rcd at 6663-65, paras. 216-17. KMYA is not entitled to protection under Section 336(f)(6)(A) of the CBPA because it did not file an application for a Class A authorization (either a Class A license or a Class A construction permit) with its application for a construction permit to move to an in-core channel. *See Reconsideration Order*, 30 FCC Rcd at 6770-72, paras. 55-58. Rather, KMYA did not file an application for a Class A authorization until July 2012, after enactment of the Spectrum Act. KMYA Eligibility Petition at 8.

[58] *Establishment of a Class A Television Service*, MM Docket No. 00-10, Report and Order, 15 FCC Rcd 6355, 6396–97, para. 103 (2000).

enactment of the CBPA,[59] Petitioners are silent as to any such efforts before 2009, almost a decade after enactment of the CBPA.[60] Videohouse claims that it had to wait until the DTV transition ended in 2009 to seek a new channel because it operated in a "highly congested market" (Pittsburgh), yet Venture demonstrated efforts to find a new channel for KHTV-CD in the even more congested Los Angeles market despite the DTV transition.[61] Furthermore, as discussed above, the evidence presented by Petitioners regarding their efforts to obtain Class A status between 2009 and February 22, 2012 does not demonstrate that they acted like Class A stations during that time period. Granting discretionary protection based on Petitioners' initiation of Class A service after February 22, 2012 would not serve Congress's goal of preserving full power and Class A service as of the Spectrum Act's enactment date.

15. We reject Petitioners' claim that the equities weigh in favor of granting discretionary protection to stations that obtained a Class A license by the Pre-Auction Licensing Deadline (May 29, 2015) and met other auction-related filing requirements.[62] Petitioners have conveniently found a line that would protect their stations, but the Commission never linked the May 29, 2015 Pre-Auction Licensing Deadline to repacking protection for out-of-core Class A-eligible LPTV stations.[63] On the contrary, the Commission plainly stated that it would *not* protect such stations based on their obtaining Class A licenses by that deadline.[64] By contrast, the line the Commission chose is tied directly to the date established by Congress for repacking protection. As discussed above, Petitioners have not shown that their stations provided the service required of Class A stations before that date, or that they took steps to avail themselves of Class A status until it was clear that doing so could yield substantial financial rewards through auction participation. Accordingly, we reject the contention that the equities weigh in favor of granting the relief Petitioners seek.[65]

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[59] *See Incentive Auction R&O*, 29 FCC Rcd at 6671-72, para. 235.

[60] *See* Videohouse Eligibility Petition at 4-9 (discussing facts beginning in March 2009); Abacus Eligibility Petition at 2-7 (discussing facts beginning in October 2009); WMTM Eligibility Petition at 2 (discussing facts beginning in 2009); KMYA Eligibility Petition at 2-8 (discussing facts beginning in 2009). *See Blanca Tel. Co. v. FCC*, 743 F.3d 860, 865-66 (D.C. Cir. 2014) (concluding that the Commission reasonably differentiated among the parties on the basis of their relative diligence in coming into compliance with hearing aid compatibility requirements).

[61] *Compare* Videohouse Eligibility Petition at 4-5 *with Incentive Auction R&O*, 29 FCC Rcd at 6671-72, para. 235.

[62] *See* Petition at 8-10. *See also* Videohouse Eligibility Petition at 2; LPTV Coalition Reply at 2-3; WatchTV Comments at 2-3; Videohouse, Abacus, WMTM, and KMYA Comments to Filings in Support of Petition for Reconsideration, GN Docket No. 12-268 (filed Nov. 17, 2015) at 1-2.

[63] The Commission did state that stations that were entitled to mandatory protection (that is, stations that held full power or Class A licenses, or filed a license to cover a full power or Class A facility application, as of February 22, 2012) would receive protection for their modified facilities if the modification was licensed by the Pre-Auction Licensing Deadline. *See Incentive Auction R&O*, 29 FCC Rcd at 6656, para. 195. The Commission also stated that four named full power stations that held construction permits with pre-February 22, 2012 issuance dates but post-February 22, 2012 expiration dates would have to be licensed by the Pre-Auction Licensing Deadline in order to be protected. *See Incentive Auction R&O*, 29 FCC Rcd at 6656, para. 196, 6717, para. 353. These circumstances did not apply to out-of-core Class A-eligible LPTV stations, however. We previously addressed why such stations are unlike the four named full power stations. *See Incentive Auction R&O*, 29 FCC Rcd at 6671 n.725.

[64] *Incentive Auction R&O*, 29 FCC Rcd at 6718 n.1053 ("[W]e will not protect LPTV stations that were eligible for a Class A license but that did not file an application for such license until after February 22, 2012. Although such entities may hold Class A licenses before the Pre-Auction Licensing Deadline, their facilities will not be protected in the repacking process, and thus the spectrum usage rights covered by such facilities will not be recognized for relinquishment.").

[65] Courts are "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." *Covad Comm'ns Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006) (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998)); *see also NASUCA v. FCC*, 372 F.3d 454, 461 (D.C. Cir. 2004).

16. Petitioners attempt to buttress their argument for discretionary protection by questioning the validity of the Commission's statement that approximately 100 stations would be eligible for protection if it protected out-of-core Class A-eligible LPTV stations that obtained Class A licenses after February 22, 2012, as Petitioners advocate.[66] But that statement does not bear on the decisional issue presented by the Petition: the reasonableness of the Commission's determination not to protect Petitioners' four stations.[67] As set forth above, the equities do not weigh in favor of granting such protection, regardless of how many stations fell into the relevant category at the time the *Incentive Auction R&O* was adopted.[68]

17. In any event, Petitioners' complaints regarding the Commission's estimate—that it never provided a list of the stations,[69] and that its explanation of how interested parties could identify the stations is unworkable[70]—lack merit. Interested parties were free to compile their own station lists from publicly available data. We explained in the *Reconsideration Order* that the stations can be identified by comparing the publicly available list of LPTV stations whose certifications of Class A eligibility were accepted by the Commission in 2000[71] to the public records in the Commission's Consolidated Database System (CDBS)[72] to determine which LPTV stations were on out-of-core channels and obtained authorizations for in-core channels, and then determining when the station filed an application for a license to cover a Class A facility. Those stations (both Class A and Class A-eligible LPTV stations) that did not file such an application by February 22, 2012 (with the exception of KHTV-CD) fall into the category identified by the Commission.[73] Petitioners mistakenly argue that the 2000 list cannot be compared to the CDBS records because many stations have converted from analog to digital using a digital companion channel since 2000 and were assigned a new digital facility ID number and call sign in CDBS that cannot be matched with the 2000 list.[74] The new digital facility ID numbers are linked to the former analog facility ID numbers in CDBS, meaning that any change in facility ID numbers does not impede matching stations to the 2000 list.[75] Moreover, after filing the Petition, Petitioners developed their own list of stations based on analysis of the 2000 list and CDBS.[76] Petitioners' November 2015 List

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[66] Petition at 7-10; *see Incentive Auction R&O*, 29 FCC Rcd at 6670, para. 232, 6671, para. 234. *See also Reconsideration Order*, 30 FCC Rcd at 6770, para. 54.

[67] There is no basis for Petitioners' assertion that the Commission somehow concedes that its prior statement is no longer valid by pointing out that it no longer bears on the decisional issue. *See* Letter from Thomas R. McCarthy, et al., Counsel for The Videohouse, Inc., et al, to Marlene S. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, 1-2 (filed Dec. 23, 2012) (*12-23 Ex Parte Letter*). Likewise, Petitioners are mistaken that they "have demonstrated on reconsideration" that the statement was incorrect for the reasons discussed below. *Id.* at 2.

[68] *See supra*, paras. 14-15.

[69] Petition at 7. The LPTV Spectrum Rights Coalition (LPTV Coalition) submits results of its analysis of the number of stations in this category. *See* LPTV Coalition Reply at 2 and Exhibit 1. The LPTV Coalition's analysis is flawed, however, because it includes stations that were downgraded from Class A to LPTV or voluntarily gave up their Class A status. *See id.* Such stations should not be included in this category, which is comprised of Class A-eligible LPTV stations that had not requested Class A television status prior to February 22, 2012.

[70] Petition at 7-8.

[71] Certificate of Eligibility for Class A Television Station Status, Public Notice, 15 FCC Rcd 9480 (MMB 2000) (*Class A Eligibility PN*).

[72] Available at http://licensing.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm.

[73] *See Reconsideration Order*, 30 FCC Rcd at 6770 n.194.

[74] Petition at 7-8.

[75] In addition, despite Petitioners' claims, Commission staff has never deleted an underlying analog facility ID number associated with a station. Similarly, while a call sign may be "deleted" through the entry of a "D" before a cancelled or revoked station's call sign, the call sign nonetheless remains in the station's record in CDBS. *See, e.g.*, http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/sta_list.pl.

confirms that any interested party could have conducted the same exercise as the Commission using publicly-available data. Although Petitioners' analysis does not match the Commission's estimate of approximately 100 stations because Petitioners sought to demonstrate something different, even their analysis does reflect that there are at least 55 stations in the category the Commission defined.[77]

18. We also reject Petitioners' claim that our "refus[al] to consider" their claims on procedural grounds, while at the same time extending discretionary protection to other stations that never filed for reconsideration, arbitrarily discriminated against them.[78] As an initial matter, we did not "refuse to consider" Petitioners' claims. While we dismissed certain claims on procedural grounds, we went on to consider all of their claims (including those we dismissed) on the merits.[79] In any event, the Commission acted within its authority in dismissing or denying Abacus's and Videohouse's 2014 Petitions in the *Reconsideration Order*, but extending protection to other stations that did not ask for reconsideration.[80] First, the Commission did not reconsider the *Incentive Auction R&O* in clarifying that out-of-core Class A-eligible stations that had a Class A construction permit application pending or granted as of February 22, 2012 and now hold a Class A license are not entitled to mandatory repacking protection.[81] The Commission may act on its own motion to issue a declaratory ruling removing uncertainty at any time.[82] Petitioners are mistaken that there was no ambiguity in the *Incentive Auction*

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[76] *See* Videohouse, Abacus, WMTM, and KMYA, Comments to Filings in Support of Petition for Reconsideration, GN Docket No. 12-268, Exhibit 1 (filed Nov. 17, 2015) ("November 2015 List"). In this filing and in a recently-filed additional list, *see Letter from Thomas R. McCarthy, Counsel, The Videohouse Inc., et al. to Marlene H. Dortch, Secretary, FCC*, GN Docket No. 12-268, at pg. 2 and Att. A (Jan. 23, 2016), Petitioners purport to demonstrate that theirs are the only Class A stations that the Commission is not protecting as a matter of discretion. As we explain above, however, the equities do not weigh in favor of extending discreationary protection to Petitioners regardless of the number of affected stations. *See supra*, paras. 15-16.

[77] Petitioners' November 2015 List includes the 965 LPTV stations on the 2000 list, categorizes them according to what Petitioners view as their current status—auction-eligible, cancelled, downgraded, or licensed as LPTV—and shows their current channels and whether they were formerly on out-of-core channels. Their analysis reflects at least 55 stations in the category the Commission originally identified: Class A-eligible stations that Petitioners categorize as "LP Licensed" (i.e., Class A-eligible) and show as having moved from an out-of-core to an in-core channel. That figure, however, excludes numerous stations included in the Commission's estimate of approximately 100 based on the methodology in the *Reconsideration Order*. For example, Petitioners categorize certain stations as "[d]owngrad[ed]" to LPTV status (presumably meaning that they have abandoned all claims to Class A eligibility or their Class A status has been rescinded) that remain Class A-eligible, *e.g.*, Facility ID numbers 586, 16540, and 28328. And Petitioners' "licensed as low power" and "downgraded" categories both include stations that moved from an out-of-core to an in-core channel but are not shown as such, *e.g.*, Facility ID numbers 28943 (channel 66 to channel 25), 51470 (59 to 38), 477 (62 to 48), and 14678 (66 to 14).

[78] *See* Petition at 16-17. Petitioners argue that "[i]f [their] requests for discretionary protection were sufficiently specific to support the grant of discretionary protection to other stations that had not even filed reconsideration petitions, then *a fortiori* Petitioners' requests were sufficiently specific to support their obtaining the same relief." *12-23 Ex Parte Letter* at 2-3. This argument is specious. The pendency of the 2014 Petitions led us to reconsider our decision regarding the extent of discretionary protection, but our action on reconsideration protecting stations that had a Class A application pending or granted as of February 22, 2012 and later obtained a Class A license was not based on the specific facts and arguments regarding Petitioners' stations set forth in the 2014 Petitions.

[79] *See Reconsideration Order*, 30 FCC Rcd at 6769, para. 53 n.183, 6770, para. 54, and 6773-74, paras. 60-61. Moreover, for reasons explained in the *Reconsideration Order*, licensees of the protected Class A stations might have failed to seek reconsideration of the *Incentive Auction R&O* because they reasonably believed their stations were entitled to protection. *See id.* at 6774-75, para. 62 n.228. *See also supra* n.[19] and *infra* n.[83].

[80] *See* Petition at 10-14. The Commission's action was not a *sua sponte* reconsideration, thus we need not address Petitioners' arguments relating to the Commission's authority to act *sua sponte*. *See id*. at 14-15.

[81] *See Reconsideration Order*, 30 FCC Rcd at 6769, para. 53.

[82] The Commission's authority to issue declaratory rulings to remove uncertainty is well-established. *See* 47 C.F.R. § 1.2 ("The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on

R&O that required clarification.[83] The *Incentive Auction R&O* explained that stations would be entitled to mandatory protection if they held a Class A license or had a "Class A license application" on file as of February 22, 2012.[84] The *Incentive Auction R&O* was ambiguous, however, as to whether a "Class A license application" meant only an application for a license to cover a Class A facility or whether it also meant a Class A construction permit application.[85] Examination of the record also reflected uncertainty as to the scope of mandatory protection under the terms of the *Incentive Auction R&O*.[86] The *Reconsideration Order* clarified this ambiguity.[87]

19. Second, in extending discretionary protection to these stations,[88] the Commission acted well within its authority to act on reconsideration. The Commission is "free to modify its rule on a petition for reconsideration as long as the modification was a 'logical outgrowth' of the earlier version of the rule, . . . and provided the agency gave a reasoned explanation for its decision that is supported by the record."[89] Here, the issue of which Class A stations to protect in the repacking process, either as required

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its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."). *See also* 47 U.S.C. § 554(e). The lack of a citation to Section 1.2 of the rules in the *Reconsideration Order* did not undermine the Commission's authority to issue a declaratory ruling. *See* Petition at 14 n.44.

[83] *See* Petition at 11 n.36.

[84] *Incentive Auction R&O*, 29 FCC Rcd at 6670-71, para. 233; *id*. at 6652-54, paras. 184-89.

[85] For example, some statements indicated that a "Class A license application" meant an application for a license to cover a Class A facility. *See Incentive Auction R&O*, 29 FCC Rcd at 6671-72, para. 235 ("After finally locating and constructing a suitable in-core channel, Venture filed its *Class A license application* just two days after February 22, 2012," meaning an application for a license to cover a Class A facility) (emphasis added); *id*. at 6671-72, para. 235 n.727 ("Venture was granted an in-core construction permit for KHTV-LP, constructed the facility, and filed *a Class A license application* for the in-core channel in July 2001," meaning an application for a license to cover a Class A facility) (emphasis added). Other statements indicated that a "Class A license application" could also mean a Class A construction permit application. *See id.* at 6671-72, para. 235 (in stating that KHTV had a "Class A license application" on file for over a decade, including as of February 22, 2012, referring to a Class A construction permit application, not an application for a license to cover a Class A facility). Moreover, the *Incentive Auction R&O* stated that out-of-core Class A-eligible LPTV stations could have "file[d] for Class A status" when filing for their in-core channel by the September 1, 2011 displacement application deadline, thereby qualifying for mandatory protection. *See id.* at 6671-72, para. 235 n.724. The Media Bureau's practice has been to allow out-of-core Class A-eligible stations to file an application for a Class A permit simultaneously with an application for an in-core LPTV construction permit. *See Reconsideration Order*, 30 FCC Rcd at 6670-71, para. 55. Thus, this statement suggested that filing for a Class A construction permit by September 1, 2011 would entitle a station to mandatory protection.

[86] For example, the stations with a Class A construction permit application pending or granted as of February 22, 2012 and a Class A license now did not file in the reconsideration proceeding, suggesting that they may have interpreted the *Incentive Auction R&O* as granting them mandatory protection. These stations also may have interpreted their inclusion in a June 2014 staff interference study as protected stations protected as indicating their entitlement to mandatory protection. *See Reconsideration Order*, 30 FCC Rcd at 6775, para. 62 n.228. *See also Incentive Auction Task Force Releases Updated Constraint File Data Using Actual Channels and Staff Analysis Regarding Pairwise Approach to Preserving Population Served*, GN Docket No. 12-268, ET Docket No. 13-26, Public Notice, 29 FCC Rcd 5687 (IATF 2014). While the staff study did not state or imply that it represented the final list of protected stations and was not binding on the Commission, it nonetheless may have added to uncertainty as to the scope of mandatory protection.

[87] *Reconsideration Order*, 30 FCC Rcd at 6769, para. 53.

[88] *See id.* at 6774, para. 62.

[89] *AT&T Corp. v. FCC,* 113 F.3d 225, 229 (D.C. Cir. 1997) (a "rulemaking is not final pending [the] resolution" of a timely filed petition for reconsideration, and a reconsideration order is "properly viewed as a further step in the ongoing [] rulemaking, rather than a commencement of a new rulemaking proceeding. . . . [T]he court must consider the entire rulemaking record from the commencement of the proceeding.") (citations omitted); *see Globalstar, Inc. v. FCC*, 564 F.3d 476, 485 (D.C. Cir. 2009) ("[O]nce Globalstar petitioned for reconsideration of

by the Spectrum Act or as a matter of discretion, was squarely within the scope of the *Incentive Auction NPRM*.[90] There is no support for Petitioners' contention that the Commission on reconsideration is limited to either granting or denying the specific relief requested in a petition for reconsideration.[91] The D.C. Circuit rejected this claim in *Globalstar*.[92] Petitioners attempt to distinguish *Globalstar* by arguing that the petitioner in that case requested broadly that the Commission "reverse" its decision, whereas Abacus and Videohouse asked the Commission to extend discretionary protection only to their stations in the 2014 Petitions.[93] This is a distinction without a difference. The 2014 Petitions asked the Commission to reconsider the scope of discretionary protection for out-of-core Class A-eligible LPTV stations that now hold Class A licenses. Both Abacus and Videohouse stated in sweeping terms that the Commission "should exercise its discretion to ensure that similarly situated entities are not subject to arbitrarily disparate treatment."[94] In response, the Commission appropriately reconsidered the scope of discretionary protection for stations in that category and extended protection to a number that it concluded are similarly situated to KHTV-CD, the station in the same category that it already had accorded such protection.[95]

20. Finally, Petitioners complain that the Commission "[w]ithout any explanation" included WDYB-CD on the June 30, 2015 list of eligible stations although, like Petitioners, WDYB-CD's current licensee, Latina, did not file an application for a license to cover a Class A facility until after February 22, 2012 or advocate for protection of its station until after adoption of the *Incentive Auction R&O*.[96] WDYB-CD was included on the June 30, 2015 list in light of our decision to protect stations that "hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012."[97] Further examination of the record reveals, however, that WDYB-CD did not

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the *2004 Order*, the Commission was free to reconsider the entire record dating back to the *2003 NPRM* and to modify the spectrum plan 'provided [it] gave a reasoned explanation for its decision that is supported by the record.'") (citations omitted).

[90] *See Incentive Auction NPRM*, 27 FCC Rcd at 12390, para. 98 (interpreting the Spectrum Act as requiring preservation only with regard to facilities that were licensed, or for which an application for license to cover was on file, as of February 22, 2012); *see id*. at 12398, para. 116 (seeking comment on whether to "protect any other authorized full power or Class A television station facilities in the repacking process").

[91] *See* Petition at 12.

[92] *See Globalstar,* 564 F.3d at 485 (rejecting Globalstar's argument that its request for reconsideration was "so narrow in scope" that it "did not open the door" for the Commission to adopt a wholly different approach). In *Globalstar*, the Commission required Globalstar to share certain frequencies with Iridium that were previously licensed exclusively to Globalstar. *See id*. at 481-83. In its reconsideration petition, Globalstar argued that sharing was infeasible and urged the Commission to reverse its decision. *See id*. On reconsideration, the Commission licensed the disputed frequencies exclusively to Iridium, something Globalstar never asked the Commission to do. *See id*.

[93] *See* Petition at 12 n.38.

[94] *See* Abacus 2014 Petition at 7; Videohouse 2014 Petition at 7.

[95] Because the Commission addressed the specific issue that was presented by the 2014 Petitions, the suggestion that the Commission exercised "unbounded discretion" on reconsideration lacks merit. *See* Petition at 13-14 (claiming that unbounded agency discretion to alter a decision on reconsideration would undermine the interest in administrative finality and conflict with the practice of courts to assess the overlap between a petition for reconsideration and a judicial appeal to determine whether the latter should be held in abeyance, because the agency could modify its decision on reconsideration without regard to the contents of the petition).

[96] *12-23 Ex Parte Letter* at 2-3, citing *Office of Engineering & Technology Releases Final Version of TVStudy and Releases Baseline Coverage Area and Population Served Information Related to Incentive Auction Repacking*, 30 FCC Rcd 6964, 6979 (June 20, 2015).

[97] *Reconsideration Order*, 30 FCC Rcd at 6675, para. 62 (explaining that, unlike the stations the Commission decided to protect in the *Reconsideration Order*, "petitioners did not certify *continuing* compliance with Class A requirements in an application filed with the Commission until after the enactment of the Spectrum Act") (emphasis

have an application for a Class A authorization pending or granted as of February 22, 2012. WDYB-CD's prior licensee obtained a Class A construction permit prior to that date, but the permit expired in December 2011.[98] Instead of constructing the Class A station, Latina filed an application for an LPTV construction permit for WDYB-CD in February 2011, which superseded the Class A construction permit.[99] The LPTV application did not require a certification that WDYB-CD was and would continue to meet all of the full power and Class A regulatory requirements that are applicable to Class A stations.[100] WDYB-CD was constructed and operated as an LPTV station until November 2012.[101] Thus, Latina was not pursuing Class A status before the Commission as of February 22, 2012.

21. We disagree with Latina that WDYB-CD properly was included in the eligible stations list simply because it had a Class A authorization prior to February 22, 2012, regardless of its status as of that date.[102] Latina's argument that our authority on reconsideration is limited to granting or denying the relief requested by Petitioners fails for the same reasons as Petitioners' arguments regarding our authority to act on reconsideration.[103] We also find unpersuasive Latina's recent estoppel and notice arguments.[104] Latina maintains that it relied on the standard the Commission announced in the *Second Order on Reconsideration*, its inclusion in eligibility notices beginning in June 2015, and the Commission's statements regarding WDYB-CD in litigation. Latina's reliance on the *Second Order on Reconsideration* was misplaced: as Petitioners point out, the Commission specifically rejected Latina's argument that it was entitled to protection because it was similarly situated to Petitioners,[105] and Latina never argued that it was entitled to protection on any other basis until filing its *1/22 Ex Parte Letter*. The eligibility notices that Latina cites emphasized that they were neither final nor intended to decide eligibility issues. For example, the June 9, 2015 public notice stated that it was "not intended to pre-judge [the] outcome" of pending reconsideration petitions regarding the scope of protection,[106] a June 30, 2015

(Continued from previous page)
added).

[98] *See* FCC File No. BDISTTA-20060922ACY, available at https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101150459&formid=401&fac_num=41375.

[99] *See* FCC File No. BDISDTL-20110215ACR, available at https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101418026&formid=346&fac_num=41375. We therefore disagree with Latina that it is similarly situated to KHTV-CD. *See Letter from Nora Crosby Soto, Manager, Latina Broadcasters of Daytona Beach, LLC to Marlene H. Dortch, Secretary, FCC,* GN Docket No. 12-268, at 6-8 (Jan. 22, 2015) (*1/22 Ex Parte Letter*). KHTV-CD had a pending application for a Class A authorization on file as of February 22, 2012. *Reconsideration Order*, 30 FCC Rcd at 6673-74, para. 60. Latina does not contest that it had no pending Class A application on file as of February 22, 2012. *See1/22 Ex Parte Letter*. Additionally, Venture, KHTV-CD's licensee, timely submitted the facts and circumstances that it maintained justified protection of KHTV-CD, *see supra*, para. 8, whereas Latina did not.

[100] Subject to the Form 302-CA certification requirements, Latina could have filed for a Class A construction permit for WDYB-CD or converted the LPTV construction permit for the station to a Class A construction permit prior to February 22, 2012. *See supra*, n.43 and accompanying text.

[101] *See* FCC File No. BLDTL-20121011AAE, available at https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101518529&formid=347&fac_num=41375 and BLDTL-20121115ACK, available at https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101520361&formid=4&fac_num=41375.

[102] *See Letter from Latina Broadcasters of Daytona Beach, LLC to Marlene H. Dortch, Secretary, FCC*, GN Docket No. 12-268, pg. 3 (Dec. 31, 2015).

[103] *Id.* at 2. *See supra*, para. 18.

[104] *See 1/22 Ex Parte Letter* at 9-13.

[105] *See supra*, n. 95.

[106] *Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, DA 15-679 n.21 (Media Bur. June 9, 2015).

public notice emphasized that "the list of stations included in the baseline data released today is not the final list of stations eligible for repacking protection,"[107] and the most recent public notice listing eligible stations noted the possibility of revisions to the baseline data.[108] Finally, before the D.C. Circuit, the Commission merely pointed out that, unlike Petitioners' stations, Class A construction permits had been obtained for WDYB-CD prior to February 22, 2012, without stating that this factual distinction entitled WDYB-CD to protection under the standard in the *Second Order on Reconsideration*. We therefore conclude that WDYB-CD is not entitled to discretionary repacking protection or eligible to participate in the reverse auction.

22. In the Incentive Auction Report and Order, and again in the Second Reconsideration Order, the Commission determined that if a Class A station obtains a license after February 22, 2012, but is displaced by the auction repacking process, it will be eligible to file for a new channel in one of the first two filing opportunities for alternate channels.[109] WDYB-CD would be eligible to file such a displacement application. Previously, we delegated authority to the Media Bureau to determine whether such stations should be allowed to file during the first or the second filing opportunity.[110] We now direct the Media Bureau to allow such stations to file during the first filing opportunity.[111]

IV. ORDERING CLAUSES

23. **IT IS ORDERED** that, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the Petition for Reconsideration filed by The Videohouse, Inc., Abacus Television, WMTM, LLC, and KMYA, LLC **IS DISMISSED AND/OR DENIED** to the extent described herein.

24. **IT IS FURTHER ORDERED** that WDYB-CD, Daytona Beach, Florida, which is licensed to Latina Broadcasters of Daytona Beach, LLC, is not entitled to discretionary repacking protection or eligible to participate in the reverse auction.

25. **IT IS FURTHER ORDERED** that this Order on Reconsideration **SHALL BE EFFECTIVE** upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[107] *Office of Engineering and Technology Releases Final Version of TVStudy and Releases Baseline Coverage Area and Population Served Information Related to Incentive Auction Repacking*, DA 15-768, pg. 2 (OET June 30 2015).

[108] *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates*, DA 15-1296, n.4 (Nov. 12, 2015).

[109] *See Reconsideration Order*, 30 FCC Rcd at 6775, para. 63; *Incentive Auction R&O*, 29 FCC Rcd at 6671, para. 234.

[110] *Reconsideration Order*, 30 FCC Rcd at 6775, para. 63; *Incentive Auction R&O*, 29 FCC Rcd at 6794 para. 554.

[111] In the event of mutual exclusivity with an application from a full power or Class A station entitled to repacking protection the application of the full power or Class A station will prevail. *See Incentive Auction R&O*, 29 FCC Rcd at 6794, para. 554 ("we will provide a priority to any station that demonstrates that it is unable to construct facilities that meet the technical parameters specified in the *Channel Reassignment PN*, or the permissible coverage variance discussed above, for reasons beyond its control.").

DISSENTING STATEMENT
OF COMMISSIONER AJIT PAI

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268.

In this *Order*, the Commission decides to ignore Will Rogers' famous advice: "If you find yourself in a hole, stop digging."

The hole in this case involves the Commission's repeated attempts to separate those "out-of-core" Class A-eligible LPTV stations receiving discretionary repacking protection in the incentive auction from those not receiving such protection. Unfortunately, the Commission's latest decisions make the hole deeper—in particular, the decision to maintain such protection for KHTV while stripping it from Latina Broadcasters of Daytona Beach, LLC's WDYB, one of the few full-power or Class A television stations in the country owned by a Hispanic woman. This is all the more unfair because the Commission had repeatedly represented to Latina that its station would be protected, only to reverse course here less than two months before the start of the incentive auction. This will make it difficult for Latina to obtain full and fair review of its claims in court. For all these reasons, I am unable to support this *Order*.

I.

The mishandling of this issue began two years ago. In 2014, the Commission took its first stab at deciding which Class A television stations would be eligible for the incentive auction (and thus protection during the post-auction repacking process). It stated that any Class A station with an application for a license to cover a Class A facility on file or granted as of February 22, 2012 (the date of the Spectrum Act's enactment) was entitled to such protection as a matter of law.[1] I agreed with that determination.

However, the Commission also went on to give so-called "discretionary protection" to one Class A station that did not meet that standard. That station was KHTV, which is located in the Los Angeles, California market.[2] This special exception, in my view, stuck out like a sore thumb and could not be justified. Yes, KHTV had tried (but failed) to transition to Class A status prior to February 22, 2012. But so had many other out-of-core Class A-eligible stations in markets where spectrum was tough to come by, and all the Commission had to say to those stations was that they were out of luck. I knew that if we granted KHTV special treatment, other out-of-core Class A-eligible stations would ask for the same benefit, and it would be difficult to deny their requests. And I found it exceptionally curious that the Commission would be going out of its way to grant repacking protection to an additional television station in Los Angeles, one of the most spectrum-constrained markets in the country. Let's just say that course of action was not at all consistent with the general tenor of the Commission's other decisions in this proceeding. For all of these reasons, Commissioner O'Rielly and I asked that the exception for KHTV be removed from the *Incentive Auction Order*. Unfortunately, we fell one vote short.

Sure enough, two out-of-core Class A-eligible stations shortly thereafter filed "me too" petitions for reconsideration, asking the Commission to protect them in the same manner that it had protected KHTV. The Commission realized that granting special discretionary protection to KHTV alone would not be defensible as a matter of law or equity. So it decided to extend discretionary protection to any station that did not construct in-core Class A facilities until after February 22, 2012, *provided that it had requested (or had been granted) a Class A construction permit by that date*.[3] This change protected

[1] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6652–54, paras. 185–89 (2014) (*Incentive Auction Order*).

[2] *See Incentive Auction Order*, 29 FCC Rcd at 6671–72, para. 235.

[3] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Second Order on Reconsideration, 30 FCC Rcd 6746, 6769, para. 53 (2015) (*Reconsideration Order*).

approximately 12 additional stations (including Latina), although strangely it did nothing to help those stations that had actually filed the petitions for reconsideration in 2014. At the time, I had some reservations about this new approach. But I felt that it was fairer than the Commission's original decision and voted for it.

Four Class A broadcasters that did not benefit from the Commission's change of heart then filed a petition for reconsideration of last year's decision. This *Order* responds to that petition and represents the Commission's third attempt to figure out which Class A stations should receive discretionary protection. While the Commission here does not grant protection to any additional stations, it does remove Latina's protection, even though no party has ever sought that result. Moreover, as explained below, the Commission maintains KHTV's protection even as it withdraws Latina's, despite the fact that there is no meaningful distinction between the two station's circumstances. So KHTV once again benefits from special treatment while a minority- and female-owned television station is left out in the cold.

II.

In its 2015 decision, the Commission agreed to protect stations "that hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012."[4] There is no dispute that Latina's station holds a Class A station license and held it at the time of the Commission's 2015 decision. It is also the case that Latina's station had an application for a Class A construction permit granted as of February 22, 2012. Specifically, the FCC granted such applications on January 18, 2002, and December 2, 2008.

It should therefore come as no surprise that the Commission included Latina's station in the June 2015 list of all television stations eligible for protection in the repacking process, the October 2015 list of opening prices for all protected stations, and the October/November 2015 final constraint files to be used by the repacking software during the incentive auction.

In seeking a writ of mandamus from the D.C. Circuit last December, the petitioners here argued that they too were entitled to protection because their stations were in the same boat as Latina's. The Commission disagreed, however, responding that "[u]nlike petitioners' stations, WDYB [*i.e.*, Latina] had obtained in-core Class A construction permits before February 22, 2012 . . . . Latina, therefore, is not 'similarly situated' to Videohouse' or the other petitioners."[5]

Yet fewer than 50 days later and fewer than 50 days before the start of the incentive auction, the Commission does a 180, kicking Latina's station out of the auction and removing its protection during the repacking process. Why? The Commission suddenly claims that Latina did not have an application for a Class A authorization pending or granted as of February 22, 2012. Specifically, it states that Latina's 2008 permit expired in 2011. (Latina's 2001 application, which was granted in 2002, is never mentioned.)

The relevant question is therefore whether Latina had an application for a Class A authorization granted as of February 22, 2012. The Commission's CDBS database says today that the current status for both of Latina's applications is "GRANTED." And there is no dispute that this is what the database showed on February 22, 2012. The matter is more complicated than that, however. With respect to

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The form in question is FCC Form 302-CA, "Application for Class A Television Broadcast Station Construction Permit or License," available at https://transition.fcc.gov/Forms/Form302-CA/302ca.pdf.

[4] *Reconsideration Order*, 30 FCC Rcd at 6675, para. 62.

[5] Federal Communications Commission, Opposition to Emergency Petition for Writ of Mandamus, *In re Videohouse, Inc.*, Docket No. 14-1486, at 7–8 & n.2 (D.C. Cir. filed Dec. 28, 2015).

Latina's 2008 application, the CDBS database also lists an expiration date of December 2, 2011. So the Commission's position, as I take it, is that the 2008 application was no longer granted as of February 22, 2012.

But that interpretation of the phrase "granted as of February 22, 2012" cannot be reconciled with the reasons provided by the Commission in 2015 for drawing that line. The Commission explained:

> By filing an application for a Class A construction permit prior to February 22, 2012, each of these stations documented efforts prior to passage of the Spectrum Act to remove their secondary status and avail themselves of Class A status. Under the Commission's rules, these stations were required to make the same certifications as if they had applied for a license to cover a Class A facility. . . . . Thus, prior to the enactment of the Spectrum Act, such stations had certified in an application filed with the Commission that they were operating like Class A stations.[6]

How does this reasoning apply to Latina? Well, Latina's station clearly documented efforts prior to passage of the Spectrum Act to remove its secondary status and avail itself of Class A status. Indeed, the station began making documented efforts to transition to Class A status more than a decade prior to the passage of the Spectrum Act! Additionally, before the Spectrum Act, Latina's station had *twice* certified in an application filed with the Commission that it was operating like a Class A station. Thus, it seems clear to me that the interpretation of the 2015 decision that had prevailed until today was correct and that Latina was eligible for protection under the standards set forth by the Commission last year. Indeed, in this *Order*, the Commission does not even try to reconcile the explanation set forth in its 2015 decision with its decision today.

Even more troubling to me is the disparate treatment accorded KHTV and Latina's station. The Commission's justification for keeping KHTV in the auction rests on a Form 302-CA it filed way back on November 25, 2002. But what the Commission neglects to mention is that by February 22, 2012, this had long since become a zombie application. The construction permit to which that application was linked had been dismissed years earlier, and KHTV did not have any right to use (or prospect of being able to use) the channel specified in the application. In short, there was no way that the application ever could have been granted. Indeed, when KHTV finally achieved Class A status, it did so through an application that was filed *after* the enactment of the Spectrum Act and specified a completely different channel from its original application. The fact that KHTV's 2002 application remained technically "pending" at the Commission on February 22, 2012 was nothing more than an administrative accident.

So stepping back and looking at the big picture, here are the basic facts. KHTV filed an application for Class A status in 2002, for which the underlying construction permit was dismissed in 2006. And Latina's station filed a similar application in 2001, which was granted in 2002, but for which the underlying construction permit expired in 2004. What, then, is the basis for protecting KHTV and not protecting Latina's station? As of February 2012, neither KHTV's 2002 Form 302-CA nor Latina's 2001 Form 302-CA offered any hope of leading to either station becoming Class A. A new Form 302-CA was necessary for that to happen, and *each station filed that form after February 22, 2012*. The only distinction here is that KHTV's Form 302-CA technically remained pending at the Commission while Latina's had been granted. But there is no reason why that difference should be material for purposes of deciding whether KHTV and/or Latina should be protected by the Commission during the repacking process.

In reality, what we have here is an entirely outcome-driven process. For whatever reason, the Commission has been driven for years to grant special protection to KHTV. And it has shifted from rationale to rationale to achieve that goal. But given the facts that are in front of us, this has led to an

[6] *Reconsideration Order*, 30 FCC Rcd at 6675, para. 62.

arbitrary outcome. Two stations that are similarly situated are being treated differently; the Commission is tossing KHTV a life preserver but is perfectly content to allow Latina's station to sink.

III.

Turning to the question of whether petitioners' stations should receive discretionary protection during the post-auction repacking process, I have some sympathy for the arguments set forth by the Commission in this *Order*. Once the Commission (mistakenly in my view) decided to go down the road of extending discretionary protection to some out-of-core Class A-eligible stations, there was no perfect line to draw, and the one set forth by the Commission in 2015 appears, at first blush, to be as reasonable as any other.

But here's the problem. We know that stations, including some of petitioners' stations, were ready to file a Form 302-CA in 2011. But they were advised not to do so by Media Bureau staff. Instead, they were told first to file for a low-power construction permit for their "in-core" station, construct those facilities, and then file a Form 302-CA to convert to Class A status. Based both on the evidence in the record as well as my office's inquiries, I have no reason to doubt that this happened, and the Commission does not deny it in this *Order*. Instead, the Commission says that parties rely on informal staff advice at their own peril.

But let's again review what happened here. Media Bureau staff in 2011 advised stations that were ready to file a Form 302-CA *not* to do so. Now the Commission is turning around and denying those stations repacking protection because they failed to file that form by February 22, 2012. The Commission is faulting stations for failing to make certain efforts prior to passage of the Spectrum Act, but ignoring the fact that the agency encouraged stations to delay undertaking those efforts. This game of gotcha might prove lawful; that will be up to a court to decide.[7] But it is not worthy of the Commission to force someone to play it.

Another area where I part company with the Commission is in its contention that petitioners' claims are procedurally improper. For the reasons set forth by petitioners, I do not agree with that position.

I'll highlight one point in particular. In its 2015 decision, the Commission claimed that reconsideration petitions raising these claims were procedurally improper. But it nonetheless relied upon those petitions to extend discretionary protection to other stations. Today, too, the Commission maintains that this petition for reconsideration is procedurally improper. But this time, it relies upon that supposedly infirm petition in removing protection from Latina's station.

Simply put, the Commission can't have it both ways. Either these petitions for reconsideration are procedurally improper or they are not. If they are, then they do not provide the Commission with any basis for taking *any* substantive action in this proceeding. And if they are not, then there is no impediment to the Commission (or a court) reviewing petitioners' substantive claims.

To be sure, the Commission argues that it is rejecting the petitioners' claims on "alternative" grounds. And in the world of fiction, it is possible to have parallel universes or alternate timelines.[8] But

[7] *Cf. NLRB v. Bell Aerospace Co*., 416 U.S. 267, 295 (1974) (raising possibility of arbitrary and capricious agency action when a "new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements"); *U.S. v. Pa. Indus. Chem. Corp*., 411 U.S. 655, 674 (1973) (raising similar concern when a regulated entity is "affirmatively misled by the responsible administrative agency into believing that the law did not apply" in a particular situation).

[8] Consider *The Mosquito's Choice*, a 1993 short story by Henry Cowper (involving parallel timelines where Adolf Hitler's survival depends upon which French Artillery Officer is bitten by a mosquito during World War I), the

here in the real world, the Commission must choose one reality. And by using these petitions for reconsideration to make substantive changes to the Commission's prior decisions, the Commission has made that choice and is precluded from arguing that these petitions were procedurally improper.

* * *

One of the Commission's foremost obligations is to enforce the law without fear or favor. The Commission doesn't meet that obligation in this *Order*. The decision to remove protection from Latina while maintaining it for KHTV is utterly indefensible. And it is impossible to reconcile the Commission's ostensible support for promoting diversity with such shabby treatment of one the few television stations in this nation owned by a Hispanic woman. For all of these reasons, I respectfully dissent.

(Continued from previous page)
"Remedial Chaos Theory" episode of the television show *Community* (where Jeff, played by Joel McHale, rolls a die to determine who will walk downstairs to pick up a delivery pizza, and the episode's plot follows how each timeline differs depending on which character has to retrieve the pizza), or that cinematic classic *Hot Tub Time Machine* (where Nick's choice of what song to play at an open mic contest causes the character, played by Craig Robinson, to either work at a dog spa or become a successful music producer).

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
CONCURRING IN PART, DISSENTING IN PART

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* GN Docket No. 12-268.

In this item, the Commission seeks to clarify which out-of-core Class A eligible low-power television (LPTV) stations would obtain protection in the Incentive Auction repacking process. As a starting point, the statute states that a LPTV station is afforded protection only if it "has been accorded primary status as a Class A television licensee." Therefore, Class A stations licensed and LPTV stations with pending applications on file for a Class A license, as of the date of the enactment of the Spectrum Act, February 22, 2012, would be eligible. Unfortunately, the Commission's Incentive Auction Order protected one out-of-core station using the rationale that it had made continuous efforts to obtain an in-core Class A license and that it missed the requisite application date by two days, among others. Based on the protection of this one station, the exemption was expanded, on reconsideration, to a protected class covering those that also had an application for a Class A construction permit either on file or granted as of the date. Now, the Commission seeks to contract the class by excluding an entity whose Class A construction permit had been granted, but subsequently expired, prior to the February 22, 2012 deadline.

Adding to this difficulty, staff public notices had previously designated this particular station for protection, but, upon further reflection, it appears that this was a mistake. All of this is highly unfortunate and regrettable. Not only does it appear as if the station took certain actions based on potentially inaccurate information from staff and relied on protection in making certain business decisions, but also – and more importantly from a policy perspective – this was all preventable.

From the very beginning, I have expressed serious concerns to staff about making discretionary decisions, along with my view that none of these stations should have received protection in the first place. Had we set a firm, no exception policy that only those out-of-core LPTV stations with Class A license applications pending would get relief, we would have never been in this position. This view is consistent with the statute. Therefore, I concur with the decision to exclude the stations as outlined in this item and dissent in part because I cannot agree with this process whereby the Commission continues to inappropriately draw and move lines regarding entities receiving discretionary protection, when, in fact, the preferable approach would be to start from scratch, eliminate all preferences, and exclude those not protected by the statute.

16-1051

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE THE VIDEOHOUSE, INC., ET AL.
PETITIONERS

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on February 12, 2016, I electronically filed the foregoing Response of Federal Communications Commission to Emergency Petition For Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Thomas R. McCarthy
William S. Consovoy
J. Michael Connolly
Consovoy McCarthy Park, PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
Counsel for: Petitioners

/s/ *James M. Carr*